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IN THE

Supreme Court of the United States

October Term 1963

No. 531

JACK B. COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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The petitioner, Jack B. Cooper, invoking the pertinent provisions of rule 58(2) of the Court's current rules, petitions for a rehearing of the Court's order of January 6, 1964 by which his petition for a writ of certiorari was denied. This petition is based on substantial grounds available to the petitioner although not presented. Such grounds, briefly and distinctly stated, are:

1. The respondent in *Commissioner* v. *Wilcox* (decided in 1946) 327 U. S. 404, 66 S. Ct. 546, 90 L. ed. 752, had embezzled $12,748.60 from his employer in 1941. The Tax Court sustained the Commissioner's determination that Wilcox was required to report the embezzled funds

as taxable income and to pay income taxes on such funds. The Circuit Court of Appeals (9th Cir.) reversed; and this Court granted certiorari because of a conflict among circuits as to the taxability of embezzled money. It was held that the Tax Court's determination that the embezzled money constituted taxable income to the taxpayer in the year it was embezzled was "a clear-cut mistake of law"; and the judgment of the Circuit Court of Appeals was affirmed.

2. The petitioner in *James* v. *United States* (decided in 1961), 366 U.S. 213, 81A S. Ct. 1052, 6 L. ed. 246, had embezzled in excess of $738,000 from his employer during the years 1951 through 1954. He failed to report or pay income taxes on the embezzled funds and he was convicted for wilfully attempting to evade the income taxes due for each of the years 1951 through 1954. On appeal the judgment of conviction was affirmed (273 F. 2d 5). This Court granted certiorari, overruled the Wilcox decision and held that the funds embezzled by James were taxable income in the year in which they were misappropriated. **Nevertheless the judgment of conviction was reversed and the case was remanded to the District Court with directions to dismiss the indictment against James because "the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed."**

3. In the instant case the Dominican Republic had made available to Cooper $2,686,142.30 with which to purchase planes and parts for its air force. The planes and parts were purchased for less than the prices which Cooper

represented to the Dominican Republic as their cost. Cooper retained and converted the excess to his own use. He reported and paid income taxes on a part of such excess as commissions received as "purchasing agent" and as "wages, salaries, bonuses, commissions [or] other compensation." The unreported excess retained by Cooper in the fiscal year ending April 30, 1953 was $418,000 and the unreported excess retained in the fiscal year ending April 30, 1954 was $266,045.37. He was indicted (in 1959) for wilfully attempting to evade the payment of income taxes on such unreported funds. A factual issue produced by the trial (without a jury) was whether Cooper was the seller of the planes and parts (in which event the unreported funds were profits realized by him from the sales) or he was a purchasing agent or representative of the Dominican Republic (in which event he embezzled the unreported funds which belonged to his principal). The trial judge was of the opinion that the question of whether the unreported funds were embezzled was immaterial. He said (record, p. 483) in a colloquy with counsel: "According to his theory it seemed to me—it wouldn't have made any difference to be frank with you, because if it had been embezzled money I still would have held him accountable, because **at that time** the Supreme Court had rectified its errors and held that embezzled money was income." Again he said (record, p. 487): "Well, even though, let me make it abundantly clear, that had it been embezzled money I would have made the same ruling." The Circuit Court of Appeals (at page 3 of its opinion) said that the Government's case in chief showed that "he [Cooper] owned no planes, but acted **either** as a purchasing representative, or as a dealer who purchased and resold them at a profit to the Dominican Republic," and that "whether one or the other is **imma-**

terial to the result reached by the District Court or here." The Court further said (at pages 7 and 8 of its opinion) that "a careful review of the evidence up to the point of the motion [the defendant's motion for an acquittal made at the close of the Government's case in chief] makes it manifest that it was ample to sustain the conviction," and that it "showed **either** that appellant was a dealer and earned the sums in question as profit, or that he received the sums as a purchasing representative or agent."

4. As the Circuit Court of Appeals stated, the evidence admittedly did not exclude the hypothesis that Cooper was an agent of the Dominican Republic and embezzled and used the unreported funds which belonged to his principal. The question of whether he was a seller or an **agent** was most important and material for the reason that if the unreported funds were embezzled moneys, Cooper stood in precisely the same legal situation as did James because the misappropriations occurred before the Wilcox decision had been overruled and while "the statute [still] contained the gloss placed upon it by Wilcox." While the funds were taxable income, as held in the James case, "the element of willfulness could not be proven," and Cooper is unquestionably entitled to the immunization accorded James.

5. Cooper's tax returns were prepared by a certified public accountant who, with knowledge of the pertinent facts and relying on the Wilcox decision, advised Cooper that the unreported funds were not taxable income (record, pp. 460-462, 466-467).

6. It is obvious that the decision of the Circuit Court of Appeals is in conflict with this Court's judgment in James v. United States, supra. It is also in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Beck v. United States* (decided in 1962), 298 F. 2d 622.

It is sincerely and earnestly urged that a rehearing be granted and that the Court's writ of certiorari be issued.

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The undersigned certifies that the foregoing petition is presented in good faith and not for delay; and that it is restricted to substantial grounds available to the petitioner although not previously presented.

Vincent C. Giblin
Of Counsel for Petitioner

PROOF OF SERVICE

The undersigned certifies that on January 21, 1964, pursuant to and in conformity to the pertinent provisions and requirements of rule 33 of the current rules of the Supreme Court of the United States, he mailed a true copy of the foregoing petition for a rehearing to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and a true copy to the Honorable William A. Meadows, Jr., United States Attorney, Federal Building, Miami 32, Florida.

Vincent T. Gibbs

Of Counsel for Petitioner